

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CHRISTINE M.,

Plaintiff,

v.

Civil Action No.
8:20-CV-1494 (DEP)

KILOLO KIJAKAZI, Acting Commissioner
of Social Security,¹

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

ANDERSON LAMB & ASSOCIATES
P.O. Box 1624
Burlington, VT 05402-1624

ARTHUR P. ANDERSON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
15 New Sudbury St
Boston, MA 02203

JAMES J. NAGELBERG, ESQ.

¹ Plaintiff's complaint named Andrew M. Saul, in his official capacity as the Commissioner of Social Security, as the defendant. On July 12, 2021, Kilolo Kijakazi took office as the Acting Social Security Commissioner. She has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.² Oral argument was conducted in connection with those motions on February 17, 2022, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

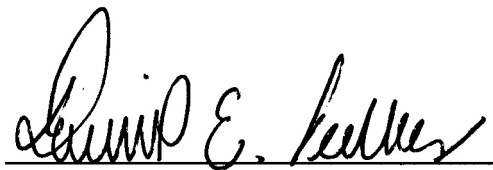
After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by

² This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.
- 3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.
- 4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.



David E. Peebles
U.S. Magistrate Judge

Dated: February 22, 2022
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CHRISTINE M.,

Plaintiff,

vs.

8:20-CV-1494

KILOLO KIJAKAZI, in her capacity as
Acting Commissioner of the Social Security
Administration,

Defendant.
-----x

Transcript of a **Decision** held during a
Telephone Conference on February 17, 2022, the
HONORABLE DAVID E. PEEBLES, United States Magistrate
Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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1 (The Court and all counsel present by
2 telephone.)

3 THE COURT: Let me begin by thanking both counsel
4 for excellent written and verbal presentations. I found this
5 to be an interesting case and a close case, quite honestly.

6 Plaintiff has commenced this proceeding pursuant to
7 42 United States Code Section 405(g) to challenge a
8 determination by the Acting Commissioner of Social Security
9 finding that she was not entitled to the disability benefits
10 for which she applied.

11 The background is as follows: Plaintiff was born
12 in March of 1973 and is currently 49 years of age. She was
13 43 years old at the time of the alleged onset of her
14 disability on July 8, 2016. Plaintiff stands 5 foot 1 inch
15 in height, weighs approximately 115 pounds. Plaintiff lives
16 in Peru, New York alone in some sort of duplex residence.
17 She is separated from her husband. She also has one adult
18 daughter. Plaintiff attended high school and has what I
19 would assume are associate degrees following two years of
20 college studying math and science, business and nursing.
21 Plaintiff is right-handed. Plaintiff has no driver's license
22 because of multiple driving while intoxicated charges. She
23 intends to reapply for her driver's license. Plaintiff
24 stopped working in July of 2016. Her work history is
25 primarily that of a registered nurse in various hospital,

1 nursing homes, and hospice settings.

2 Plaintiff suffers from mental impairments including
3 bipolar disorder which has been described as rapidly cycling,
4 attention deficit and hyperactivity disorder, and generalized
5 anxiety disorder. She experiences visual and audio
6 hallucinations including believing she sees bugs on the floor
7 and hears voices. Plaintiff was hospitalized involuntarily
8 for two days in 2014 for various reasons, including alcohol
9 use and overdose. She was also taken to the emergency room
10 of a hospital in August of 2015 due to alcohol intoxication.

11 Physically, plaintiff has a history of back pain
12 but that does not appear to be the focus of plaintiff's claim
13 for disability benefits.

14 Plaintiff has undergone treatment from various
15 sources, including Nurse Practitioner Sarah Howell who she
16 began seeing in November 2018, RPA Robin Hinson, Dr. Taher
17 Zandi from January '18 forward. Dr. Zandi tested, he is a
18 neuropsychologist and tested plaintiff on three occasions.
19 The plaintiff also has seen a behavior medicine specialist
20 NPP Jennifer Kanaly who she saw four times from January
21 through March of 2018, and LMSW Leticia Ferby who she saw
22 three times. She receives some sort of home counseling
23 weekly.

24 Plaintiff has been prescribed various medications
25 including Adderall, Depakote, Klonopin, trazodone, Vraylar,

1 and medicines have been described as helping her conditions
2 somewhat.

3 Activities of daily living of the plaintiff include
4 the ability to dress, bathe, groom, do household chores,
5 watch television, walk her dog, she works in the garden, and
6 she can use the microwave.

7 Plaintiff had drug and alcohol problems in the
8 past. She last consumed alcohol, according to her, in May of
9 2016.

10 Procedurally, plaintiff made an earlier application
11 in April of 2018. That application was denied and a request
12 to reopen that earlier application was denied by the
13 administrative law judge in this case. On October 2, 2018,
14 plaintiff applied again under Title II for disability
15 benefits, alleging an onset date of July 8, 2016 and arguing
16 that she was disabled on the basis of her bipolar disorder
17 and ADHD. A hearing was conducted on October 16, 2019 with a
18 vocational expert by Administrative Law Judge Asad M.
19 Ba-Yunus. On November 7, 2019 the administrative law judge
20 issued an unfavorable decision which became a final
21 determination of the agency on October 6, 2020 when the
22 Social Security Administration Appeals Council denied
23 plaintiff's application for review. This action was
24 commenced on December 4, 2020, and is timely.

25 In his decision, the ALJ applied the familiar

1 five-step sequential test for determining disability. He
2 found at step one, after concluding that plaintiff was last
3 insured on December 31, 2021, that plaintiff had not engaged
4 in substantial gainful activity since July 8, 2016.

5 At step two, he concluded that plaintiff suffers
6 from severe impairments that impose more than minimal
7 limitations on her ability to perform basic work functions
8 including bipolar disorder and ADHD, rejecting alcohol abuse
9 as an additional severe impairment.

10 At step three, the ALJ concluded plaintiff's
11 conditions do not meet or medically equal any of the listed
12 presumptively disabling conditions set forth in the
13 Commissioner's regulations, specifically considering Listings
14 12.04 and 12.06.

15 The ALJ next concluded that notwithstanding her
16 impairments, plaintiff retains the residual functional
17 capacity or RFC to perform the full range of work at all
18 exertional levels with the following nonexertional
19 limitations: The plaintiff may perform unskilled simple
20 routine tasks and may have occasional interaction with
21 coworkers and the general public and can tolerate occasional
22 changes to a routine work setting. Applying that RFC
23 finding, the ALJ concluded that plaintiff, at step four, is
24 incapable of performing her past relevant work.

25 At step five, noting the shifting of burdens, the

1 administrative law judge concluded based upon the testimony
2 of the vocational expert that plaintiff is capable of
3 performing available work in the national economy including
4 as a hand packager, industrial cleaner, and dishwasher and
5 therefore concluded that she is not disabled.

6 As you both know, the court's function is limited
7 in this case to determining whether correct legal principles
8 were applied and whether the result is supported by
9 substantial evidence, defined as such relevant evidence as a
10 reasonable mind would find sufficient to support a
11 conclusion. As the Second Circuit has noted in *Brault v.*
12 *Social Security Administration Commissioner*, 683 F.3d 443
13 from the Second Circuit 2012, this is an extremely
14 deferential standard, more so than the clearly erroneous
15 standard that lawyers are familiar with. Under the
16 substantial evidence standard, once an ALJ makes a finding,
17 that finding may be rejected only if a reasonable fact finder
18 would have to conclude otherwise.

19 In this case, plaintiff makes two basic
20 contentions: First, arguing that the residual functional
21 capacity is lacking because there is no limitation associated
22 with plaintiff's being off task and absent and there is no
23 discussion by the ALJ concerning that subject; secondly, she
24 challenges the weight afforded by the ALJ to Dr. Zandi's
25 opinions and seeks a remand with a directed finding of

1 disability arguing that there is persuasive proof in the
2 record to establish disability.

3 Turning first to the off-task and absence issue.
4 Admittedly, there's no finding or limitation in the RFC
5 concerning those issues, nor is there any direct discussion
6 of the issues. There are several opinions in the record that
7 speak to the issue. Those opinions of course are subject to
8 evaluation under the new regulations. Under those
9 regulations an ALJ does not confer or give any specific
10 evidentiary weight, including controlling weight, to any
11 medical opinions or prior administrative medical findings
12 including those from a claimant's medical sources. Instead,
13 the ALJ must consider those medical opinions using factors
14 that are set out including particularly supportability and
15 consistency of the medical opinions. The ALJ must articulate
16 how persuasive he or she found each medical opinion and must
17 explain how he or she considered the supportability and
18 consistency of those medical opinions. The ALJ may also, but
19 is not required, to explain how he or she considered the
20 other relevant factors as appropriate in each case. 20
21 C.F.R. Section 404.1520c(b).

22 Supportability is defined under the regulations as
23 follows: The more relevant the objective medical evidence
24 and supporting explanations presented by a medical source are
25 to support his or her medical opinions or prior

1 administrative medical findings, the more persuasive the
2 medical opinions or prior administrative medical findings
3 will be. Consistency is defined as the more consistent a
4 medical opinion(s) or prior administrative medical finding(s)
5 is or are with the evidence from other medical sources and
6 nonmedical sources in the claim, the more persuasive the
7 medical opinions or prior administrative medical findings
8 will be, and that appears at 20 C.F.R. Section 404.1520c(c).

9 Of course the weight to be given to conflicting
10 medical opinions is a matter entrusted to the administrative
11 law judge, *Veino v. Barnhart*, 312 F.3d 578, from the Second
12 Circuit 2002.

13 The first opinion that speaks to -- not the first
14 chronologically, but one opinion that speaks to the issue of
15 off task and absenteeism at least indirectly is from Dr. H.
16 Ferrin, a state agency consultant. His opinions are from
17 December 17, 2019 and appear in the record at administrative
18 transcript 91 through 103. In his mental RFC conclusion,
19 Dr. Ferrin did state, among other things, that the claimant
20 can maintain adequate attention and concentration to complete
21 work-like procedures and can sustain a routine. He did note
22 some difficulty in socialization and adaptation. In the
23 worksheet, interestingly, on page 99, Dr. Ferrin found that
24 plaintiff is moderately limited in her ability to complete a
25 normal workday and workweek without interruptions from

1 psychologically-based symptoms and to perform at a consistent
2 pace without an unreasonable number and length of rest
3 periods.

4 Another opinion was given on the issue by Dr. Brett
5 Hartman on November 28, 2018. I should say that Dr. Ferrin's
6 opinion was found partially persuasive by the administrative
7 law judge. Dr. Hartman's opinion appears at 541 to 545. It
8 was found partially persuasive. Dr. Hartman in his medical
9 source statement found moderate to marked difficulty
10 sustaining concentration, moderate to marked difficulty in
11 regulating her emotions, she has a marked difficulty in
12 sustaining an ordinary routine due to mood swings.

13 Nurse Practitioner Sarah Howell gave an opinion on
14 October 6, 2019 that appears at page 800 to 801. In that
15 opinion, Nurse Practitioner Howell concluded that plaintiff
16 would miss upwards of 75 percent of the time due to her mood
17 swings and would only be on task two out of eight hours with
18 frequent breaks. That opinion is found by the administrative
19 law judge not to be persuasive based on treatment notes and
20 plaintiff's activities of daily living.

21 Dr. Zandi issued three opinions, one on June 1,
22 2018, appears at page 426 to 443. I did not find any opinion
23 that directly spoke to work activities directly. It was
24 found to be not persuasive by the administrative law judge
25 and of limited use.

1 On November 15, 2018, Dr. Zandi issued a second
2 opinion at page 804 to 809, finding that plaintiff would be
3 off task more than 20 percent of the time. She does not have
4 the ability to concentrate and focus on job tasks for
5 two-hour periods and would need extra breaks. That was found
6 to be only partially persuasive.

7 On August 27, 2019, Dr. Zandi issued another
8 opinion at pages 787 to 799, found partially persuasive. In
9 it he noted some improvement in cognitive areas, no
10 improvement in emotional aspects, and stated that plaintiff
11 cannot sustain a routine. The administrative law judge
12 acknowledged Dr. Zandi's opinion concerning plaintiff's
13 inability to maintain concentration and complete work-like
14 procedures and sustain a routine, but does not discuss why it
15 was not included in the RFC.

16 I find this to be a very close case and of course
17 it is not the court's function to reweigh these opinions.
18 However, and I acknowledge the cases that suggest that the
19 opinion of Dr. Ferrin can be given more weight than another
20 opinion because Dr. Ferrin is a qualified expert in the field
21 of Social Security Disability such as *Sonjah H. v. Berryhill*,
22 2019 WL 936630, from the Northern District of New York, 2019.
23 However, Dr. Ferrin did note at least some deficit in this
24 area. It is a critical area that should have been addressed.
25 I agree with my colleague and good friend, retired Magistrate

1 Judge John M. Conroy, who in *Nicholas L. v. Commissioner of*
2 *Social Security*, another case involving a plaintiff,
3 parenthetically, represented by Mr. Anderson, 2020 WL 91025
4 from the District of Vermont 2020, that because this issue
5 was front and center and was even identified by the
6 administrative law judge both in his hypothetical to the
7 vocational expert and in his opinion, there should have been
8 a more fulsome discussion as to why implicitly from his RFC
9 he did not find, he did not agree and rejected the suggestion
10 that plaintiff would be off task and/or absent to an extent
11 that would preclude work activities. Judge Conroy noted in
12 that decision, like in this case, that the ALJ apparently
13 rejected these critical opinions without analysis because he
14 did not include limitations regarding being off task,
15 additional breaks, or work absences in the RFC determination.

16 The opinion of Dr. Ferrin that plaintiff would be
17 moderately limited in her ability to complete a normal
18 workday and workweek without interruptions is not wholly
19 inconsistent with these other opinions, as District Judge
20 Charles Siragusa noted in *Bruner v. Colvin*, 2017 WL 4215942
21 from the Western District of New York 2017.

22 So I do find error to the extent that the
23 administrative law judge did not explain his reasoning for
24 rejecting these opinions which all uniformly say that
25 plaintiff, because of her rapidly cycling bipolar disorder,

1 has at least some deficit in her ability to maintain
2 concentration and attention and keep to a routine schedule.
3 I don't, as plaintiff argues, I do not find persuasive proof
4 of disability in this case, nor am I reweighing the medical
5 opinions in the record, that is clearly a matter for the
6 Commissioner. But I do find that there is a need for more
7 explanation so that the court can meaningfully review the
8 determination and ensure that it is supported by substantial
9 evidence, so I will vacate the Commissioner's determination
10 and remand the matter for further consideration, and
11 specifically for consideration of plaintiff's ability to
12 maintain concentration and attention and to keep a schedule.

13 Thank you both for excellent presentations, I hope
14 you have a good afternoon.

15 MR. ANDERSON: Thank you, your Honor.

16 MR. NAGELBERG: Thank you, your Honor.

17 (Proceedings Adjourned, 12:04 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
Official Realtime Court Reporter, in and for the
United States District Court for the Northern
District of New York, DO HEREBY CERTIFY that
pursuant to Section 753, Title 28, United States
Code, that the foregoing is a true and correct
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proceedings held in the above-entitled matter and
that the transcript page format is in conformance
with the regulations of the Judicial Conference of
the United States.

Dated this 18th day of February, 2022.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter